Centre de recherche sur les transports (C.R.T.)
Centre for Research on Transportation

CRT-2004-03

U.S. & CANADIAN INTERMODAL (OCEAN AND LAND) CARRIER BASIS OF LIABILITY AND THE CONCEPTS OF PRESUMPTION OF LIABILITY, LIABILITY FOR NEGLIGENCE, CIVIL LAW FORCE MAJEURE AND THE COMMON LAW FORCE MAJEURE CLAUSES

by

Maria Eleftheria Katsivela

January 2004

Université de Montréal
C.P. 6128, succursale Centre-ville, Montréal QC H3C 3J7 Canada
Téléphone: (514) 343-7575 / Télécopieur: (514) 343-7121

crt@crt.umontreal.ca
www.crt.umontreal.ca

HEC ÉCOLE POLYTECHNIQUE MONTRÉAL Université de Montréal

PUBLICATION
CRT-2004-03

U.S. & CANADIAN INTERMODAL (OCEAN AND LAND) CARRIER BASIS OF LIABILITY AND THE CONCEPTS OF PRESUMPTION OF LIABILITY, LIABILITY FOR NEGLIGENCE, CIVIL LAW FORCE MAJEURE AND THE COMMON LAW FORCE MAJEURE CLAUSES

by

Maria Eleftheria Katsivela

This research was supported in part by the Canadian National (CN) Chair in Economics and Intermodal Transportation.

[1] Faculté de droit, Université de Montréal, C.P. 6128, succursale Centre-ville, Montréal, Canada H3C 3J7

Dépôt légal – Bibliothèque nationale du Québec
Bibliothèque nationale du Canada, 2004

Abstract

The basis of intermodal carrier liability in the U.S. and Canada is not subject to a uniform set of rules but is, rather, governed by unimodal carrier liability laws and practices. The principles of presumption of liability, liability for negligence, the civil law force majeure concept and the common law force majeure clauses define unimodal (ocean and land) carrier basis of liability in the two countries. The present article aims at clarifying said liability concepts; enhancing comprehension of currently applicable intermodal laws and providing a solid basis upon which uniformity initiatives of multimodal carrier liability, undertaken at the international level, can grow.

Keywords: intermodal, multimodal, United States, Canada, carrier liability, presumption of liability, liability for negligence, force majeure, force majeure clauses.

Résumé

Le fondement de la responsabilité du transporteur intermodal aux États-Unis et au Canada n'est pas assujetti à des règles uniformes mais plutôt à des règles et pratiques propres au transport unimodal. Les principes de présomption de responsabilité, responsabilité pour faute, la notion de force majeure en droit civil et les clauses de force majeure en droit commun (common law) définissent le fondement de la responsabilité des transporteurs unimodaux (maritimes et terrestres) dans les deux pays. Le présent article vise à clarifier ces notions de responsabilité afin d'aider à la compréhension des règles juridiques s'appliquant au transport intermodal et d'aider au développement d'initiatives d'uniformisation des règles de responsabilité du transporteur intermodal.

Mots-clés : intermodale, multimodale, États-Unis, Canada, responsabilité du transporteur, présomption de responsabilité, responsabilité pour faute, force majeure, clauses de force majeure.

Introductory remarks: The etymological origin of the term liability is the latin word *ligare* which means "to bind, to tie"[1]. The definitions of liability are numerous and vary according to the many components and fundamental sources that one takes into account, such as liability for fault/negligence[2], presumption of fault, presumption of liability (basis of carrier liability)...and a multitude of similar notions and expressions that can be found in common and/or civil law systems[3]. The basis and contractual or statutory limitation of carrier liability in case of loss or damage to the transported goods are at the heart of judicial and doctrinal analysis tackling carriage of goods liability issues.

In the field of multimodal carriage of goods[4], multimodal carrier[5] liability (basis and limitation of carrier liability) is not governed by a uniform set of rules but is rather subject

---

[1] *Online Etymology Dictionary* (2001) online: Online Etymology Dictionary <http://www.etymonline.com/l3etym.htm> (last modified: November, 2001). It is interesting to note, in this regard, that the word 'liability' has the same roots as the word 'religion': re-ligare means 'to bind back together'.

[2] In the present study, the concepts of negligence and of fault will be used interchangeably since in civil law systems authors describe negligence as a variation of the concept of fault (involuntary fault). In common law systems, the concepts of 'negligence' and of 'fault' are, if not identical, at least very similar, with the concept of fault being inclusive of the concept of negligence. G.H. Treitel, *Frustration and Force Majeure* (London: Sweet & Maxwell, 1994) at 474 and France Ferrari, "Comparative Remarks on Liability for Ones Own Acts" (1993) Loy. L. A. Int'l. L. J. 813 at 825-826.

[3] Comment based on the article of Francisco Bonet Ramon, "Strict Liability" (1982) Louisiana L. Rev. 1679 at 1681. We will herein refer to the 'liability for fault/negligence, presumption of liability, presumption of fault' principles as the 'basis of (carrier) liability'.

[4] Multimodal, 'combined', intermodal' or 'door-to-door' transport appear to be synonymous terms involving the shipment of cargo or people through more than one mode of transportation during a single, seamless journey. W. Brad Jones, Richard Cassady, Royce O. Bowden, "Symposium on Intermodal Transportation: Developing a Standard Definition of Intermodal Transportation" (2000) 27 Transp. L. J. 345 at 349. This is the definition of multimodal carriage which, as limited to the transportation of goods, we will adopt in the present article. It does not refer to multimodal carrier liability rules which are quite complicated in practice as we are going to affirm later. Seemless means that transitions between modes occur smoothly with minimal delay. ***Ibid*** at 350. We will use the terms 'multimodal', 'intermodal' and 'combined' carriage interchangeably, oppose them to unimodal carriage (carriage of goods by one mode of transportation) and limit their application to intermodal journeys comprising a land and an ocean leg of transportation.

[5] Multimodal transportation today is almost entirely the domain of the international freight forwarding industry. Freight forwarders or multimodal transport operators agree to be responsible for the complete movement of the goods and may carry the goods on their own vehicle for one stage of the journey or, simply procure performance of the entire contract through sub-contracting with other carriers. They arrange for the door-to-door transport of goods and act as principals (contracting carriers) vis-à-vis shippers or as their agents in sub-contracting with performing carriers who actually transport shipper's goods. *Multimodal Liability: Extracts from a Statement by the CIFFA Seafreight Committee* (1998) online: Forwarder Law Homepage <http://www.forwarderlaw.com/feature/multim.htm> (last modified: Nov. 26, 1999), *Mandate of CIFFA's Seafreight Committee* (1999) online: CIFFA abbreviations Homepage <http://www.ciffa.com/aboutciffa_mandateseafreight.html> (last visited: continuously), Hugh M. Kindred,

to a fragmented liability regime that differs cross-modally and cross-country[6]. In effect, multimodal shipments worldwide frequently move under a 'Multimodal or Combined Transport Bill of Lading' (or 'through' BOL[7]) that covers the 'door-to-door' journey or under multiple unimodal BsOL[8]. Usually, the issuing carrier of a 'through' BOL agrees to be responsible for the cargo from the point of origin to the point of final destination even if the damage occurs in segments of the journey not covered by him[9]. In this case, issuing carrier liability is determined by the regime applicable to the carrier where the damage actually occurs since the *damage* is *evident*[10]. When multiple unimodal BsOL are issued to cover the door-to-door journey and evident damage occurs, the carrier performing the stage in question will be held liable. In both cases of 'through' and multiple unimodal BsOL, the fate of the intermodal shipper depends on the portion of the intermodal route where the damage occurs and the liability principles applicable to it[11].

Mary R. Brooks, *Multimodal Transport Rules* (Hague: Kluwer Law International, 1997) at 5. William Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 692s. Although freight forwarders may frequently undertake intermodal carriage of goods as principals, their contractual relationship with the shipper has tended to be that of an agency. C. W. G. Wilson, "Through Transport: The Role of the Freight Forwarder" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 2-3. The present article will comment on freight forwarder liability as principals.

[6] While liability of unimodal carriers is governed by various conventions and national laws, freight forwarder liability is not subject itself to any convention or national law but is rather determined by contracts. *Multimodal Liability: Extracts from a Statement by the CIFFA Seafreight Committee* (1999) online: Forwarderlaw Homepage <http://www.forwarderlaw.com/Feature/multim.htm> (last modified: Nov. 26, 1999).

[7] The abbreviation BOL stands for Bill of Lading. The 'bill of lading' (BOL) or 'bill of loading', as it was once called, is the principal instrument of shipment of goods in transport. W. Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 215 and at 927.

[8] ***Ibid*** at 927. The denomination 'through bills' is also used for unimodal successive carries. For instance, the 'pure ocean through bill of lading' and 'ocean through bill of lading' involve successive ocean carriers. ***Ibid***. This type of 'through' bills will not retain our attention.

[9] ***Ibid***. When the multimodal journey includes a sea leg of transportation, the sea carrier is almost always the issuing carrier. William J. Coffey, "Multimodalism and the American Carrier' (1989) 64 Tul. L. Rev. 569 at 586. In this respect, we have to note that the international multimodal channel in the U.S. and Canada is dominated by ocean carriers who have long taken a leadership role in intermodal transport worldwide constituting the clear channel captain. John C. Taylor, «Conflict, Power and Evolution in the Intermodal Transportation Industry's Channel of Distribution» (2000) 4/1/00 Transp. J. 517 at 519.

[10] William Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 928. For evident and concealed damage see ***infra*** note 12.

[11] Kurosh Nasseri, "The Multimodal Convention" (1998) 19 J. Mar. L. & Com. 231 at 233.

In case of *concealed damage* in the presence of a 'through' BOL, the terms of the bill contain, most frequently, a presumption that the loss occurred on the ocean carrier leg of the transportation[12]. Generally, when the issuer of the intermodal through bill accepts responsibility for the cargo from the point of origin to the point of final destination then, no matter where the loss occurred, the cargo owner can hold the issuing carrier liable for the damage[13]. However, issuing carrier is entitled to the benefit of liability provisions applicable to his leg of the transportation[14]. When non-through BsOL are issued, the cargo owner may not always be able to establish which, if any, of the carriers received the cargo in good condition and delivered it damaged (shipper *prima facie* case)[15]. Thus, the cargo owner may not be able to recover from any carrier for the damage[16].

In all cases, multimodal carrier basis and limitation of liability entail examination of cross-country and cross-modal applicable rules. Since the present article comments merely on the basis of intermodal carrier liability in the U.S. and Canada, we will examine unimodal (limited to ocean and land) carrier basis of liability rules in said countries. In this way, the principles of presumption of liability, liability for negligence, civil law force majeure concept and common law force majeure clauses will retain our attention. Pondering over conceptual distinctions among all mentioned terms and notions will permit

---

[12] Consequently, the cargo owner may recover from someone. ***Ibid*** and Jack G. Knebel Savoie Blocker, "United States Statutory Regulation of Multimodalism" (1989) 64 Tul. L. Rev. 543 at 562, 563 and 567. Concealed damage is damage produced during the multimodal journey when it cannot be determined in what stage of the journey the damage actually occurred. This may be the case when the carrier ships sealed containers where he cannot verify the condition of the goods therein contained. In the present article we oppose 'concealed damage' to 'evident damage' since, in the latter case, it is obvious in what stage of the journey the damage took place.

[13] Jack G. Knebel Savoie Blocker "United States Statutory Regulation of Multimodalism" (1989) 64 Tul. L. Rev. 543 at 563-564.

[14] See ***ibid*** at 563 and doctoral thesis of Nicole Lacasse, *International Multimodal Transport of Goods. Comparative Study of Canadian and French Laws* (D. Jur. Thesis, University of Paris 1, 1988) [unpublished: archived at the University of Nantes under micro-fiche number: 88.57.06285/88] at 78 for the case of the ocean carrier.

[15] Jack G. Knebel, Savoie Blocker, "United States Statutory Regulation of Multimodalism" (1989) 64 Tul. L. Rev. 543 at 562. Also, if the carrier makes reservations on the BOL as to the description of the goods made by the shipper or the shipment in general, the *prima facie* case is not established.

[16] ***Ibid***.

us to comprehend the mechanisms of intermodal carrier basis of liability rules in the two countries, putting into evidence divergences and similarities present cross-modaly and cross-country. The thereby clarification of applicable rules provides a solid basis upon which a uniform multimodal carrier liability regime, so desirable at the international level, could grow[17].

U.S. and Canada Motor, Rail and Ocean Carrier Basis of Liability: Canada's interprovincial and international trucking is subject to the 1987 *Motor Vehicle Transport Act* (MVTA)[18] that delegated to the provinces the authority to regulate in this field. Interprovincial agreement has led to the adoption of the 'Canadian Uniform Highway Bill

---

[17] Nowadays, the 2001 CMI (Comité Maritime International) released 'Model Transport Law' also known as 'UNCITRAL (United Nations Commission on International Trade Law) Preliminary Draft Instrument on Transport Law' or 'CMI/UNCITRAL Draft Instrument' following its approval by UNCITRAL gains momentum at the international level since it attempts to regulate multimodal carrier liability among other topics such as electronic communication, freight, liens, negotiability. On December 10, 2001 the CMI adopted its "Final Draft Instrument on Issues of Transport Law" after 3 ½ years of meetings, conferences, questionnaires, long drafting sessions and international conferences. The CMI final Draft Instrument was immediately delivered to UNCITRAL that sanctioned it. The new 'UNCITRAL Preliminary Draft Instrument on Transport Law' [hereinafter Draft Instrument] was dated January 8, 2002. The draft document was intended to be a multi-purpose convention, an extremely ambitious project. William Tetley, *Let's Have a Two Track Approach* (2002) online: Tetley Law Homepage <http//tetley.law.mcgill.ca/maritime/uncitralcomment.htm> (last modified: continuously). The *Draft Instrument* can be found online: Tetley Law Homepage <http://tetley.law.mcgill.ca/uncitral.htm> (last modified: continuously).
The CMI/UNCITRAL Draft Instrument is under concerted attack by international bodies and doctrine that question its intermodality, content, clarity and harmonization of currently applicable rules. Santanu Sanyal, "The Multimodal Debate" *Business Line (The Hindu)* (2003) online: WESTLAW (Newsletters), "CMI Model Transport Law under Scrutiny" *Ll. List. Int'l* (2002) online: WESTLAW (Newsletters). *UNECE Comments to the UNCITRAL Draft Instrument* (2002) online: Tetley Law Homepage <http://tetley.law.mcgill.ca/unece.htm> (last modified: continuously) stating that the draft instrument is based purely on maritime provisions and insisting on harmonization of North-American and European laws on the issue. *UNECE Ad-Hoc Expert Group on Civil Liability in Multimodal Transport* (2002) online: UNECE Homepage <http://www.unece.org/trans/new_tir/wp24/documents/wp24-0206e.pdf> (last visited: March 5, 2002).

[18] *Motor Vehicle Transport Act*, (MVTA) R. S., 1985, c. 29 (3rd Supp.). Recent amendments and announcements of amendments to the MVTA focuse(d) on motor carrier safety performance. *Transport Minister Tables Amendments to the MVTA, 1987* (2001) online: Transportation Canada Homepage <http://www.tc.gc.ca/releases/nat/01_h009e.htm> (last visited: January 31, 2001). *Motor Vehicle Transport Act 1987* (2001) online: Transport Canada Homepage <http://www.tc.gc.ca/en/mediaroom/backgrounders/mvta.htm> (last visited: Jan. 2001), *Transport Minister Announces Motor Carrier Safety Regulations* (2003) online : Transport Canada Homepage <www.tc.gc.ca/mediaroom/releases/nat/2003/03-h040e.htm> (last modified: March 5, 2003) and *Regulations Amending the Motor Vehicle Transport Act* (2003) online: Transport Canada Homepage <http://www.tc.gc.ca/mediaroom/backgrounders/b03-R040.htm> (last modified: Aug. 1, 2003).

of Lading' (CUBOL)[19]. CUBOL provisions apply to all interprovincial and international freight in Canada. The form of the bill is prescribed by the province where the carriage originates[20] and its content is more or less uniform among provinces so that possible divergences are more of an academic, rather than of a practical, interest[21].

CUBOL presumes carrier liability[22] once shipper-claimant makes its *prima facie* case (amount of damage, receipt of goods in good condition by the carrier and delivery in bad condition)[23]. Its clause 5 adopts the following carrier liability defenses[24]: i) acts of God, ii) Queen's or public enemies, iii) riots, iv) strikes, v) defect or inherent vice in the goods, vi) act or default of the consignor owner or consignee, vii) authority of law, viii) quarantine and ix) natural shrinkage. If a carrier is to rely on one of these liability exemptions he must prove that the particular defense was the proximate cause of loss to which his or his servants negligence did not contribute[25]. Even though there seems to be some discussion on whether contractual limitation of motor carrier liability is permitted under CUBOL

---

[19] CUBOL was elaborated in 1977 by the Inter-Governmental Canadian Conference of Motor Transport Administrators composed of the federal Minister of Transport and the provincial Ministers responsible for Motor Vehicle Administration. It was published in Canadian Manufacturer's Association Transportation Circular 4654 of September 23, 1977. Canada, Canadian Manufacturer's Association, *The Bill of Lading: What is Behind the Fine Print* (Canada: Canadian Manufacturer's Association, 1979) at 11.

[20] John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 28 and at 14.

[21] ***Ibid*** at 29 and at 12.

[22] The presumption of liability principle is a well known principle in both civil (***infra*** at 12) and common law systems. The principle of presumption of liability is a theory of strict liability in both U.S. and Canadian common law jurisdictions. U.S.: Megan Shemwell, "Ross v. Lacoste de Monterville: An Unwarranted Extension of Strict Liability for the Act of Things" 48 La. L. Rev. 1285 at 1286. Stephen R. Perry, "The Moral Foundations of Tort Law" 77 Iowa L. Rev. 449 at note 48. Canada: See the interesting case *Witman* v. *Johnson* (1990) 74 DLR (4th) 428 (Manitoba C.Q.B.).

[23] *Calgary Tpt. Services Ltd.* v. *Pyramid Mgnt Ltd.* (1976), 71 D. L. R. (34) 234 (Alta. C. A.) citing John S. McNeil. John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 66-67. *Voest-Alpine Canada Corp.* v. *Pan Ocean Shipping Co.* (1991), 55 B. C. L. R. (2d) 357 (B. C. S. C.). This is an ocean carriage case that refers to two U.S. multimodal (ocean-motor) transport cases and adopts their conclusions on burden of proof.

[24] John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 99.

[25] *Chet's Transport Inc. v. Seaway Distributors Ltd.* [1987], N. S. J. No. 368 (N. S. S. C.) and *Calgary Tpt. Services Ltd.* v. *Pyramid Mngnt Ltd.* (1976), 71 D. L. R. (34) 234 (Alta.C.A.) citing John S. McNeil, John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto : Carswell, 1997) at 67. Dr. Boris Kozolchyk, Gary T. Doyle, Lic Martin Gerardo Olea Amaya, *Transportation Law and Practice in North America* (Tuscon: National Law Center for Interamerican Free Trade, 1996) at 53.

provisions. Canadian motor carriers do not appear to have recourse today to such a practice[26].

Motor carriers in the U.S. are subject to the 1906 Carmack Amendment, the 1980 *Motor Carrier Act*, the 1994 *Trucking Industry Regulatory Reform Act* and the 1995 *Interstate Commerce Commission Termination Act*, the last three acts setting in principles of contract to govern carrier liability[27]. Under all these acts shippers may not recover if they do not make a *prima facie* case of receipt of goods in good condition, arrival in damaged condition and amount of damages[28]. When the *prima facie* case is established carrier liability is presumed and the burden of proof shifts to the carrier who will be relieved from liability only if it can prove its freedom from negligence with respect to an excepted peril: i) an Act of God, ii) public enemy, iii) authority of law iv) act or omission of the shipper or

---

[26] Interview of the author with Canadian Transportation Agency personnel (Nov. 29 and Dec. 1, 2000) and Colin Barrett, "Inadvertence Clauses in Canada?" *Traffic World* (2000) online: LEXIS (Transp. News). On the discussion on whether contractual limitation of motor carrier liability is possible in Canada see Marel Katsivela, *Multimodal Carrier Liability in the U.S. and Canada: Towards Uniformity of Applicable Rules?* (Ph.D. Thesis, University of Montréal/University of Nantes, 2003) [submitted, unpublished] at 138-145.

[27] The 1906 *Carmack Amendment* [34 STAT. 595 (1906) codified as amended at 49 U. S. C. par. 14706, 10730 and 11707] is applicable to land transport (motor and rail). The Carmack Amendment restates common law provisions on land (motor, rail) carrier liability and takes effect when contractual provisions do not. Initially applicable to U.S. railways, the Carmack Amendment later extended its reach to motor carriers responding to the desire of Congress to provide uniform interstate carrier liability rules. After the passage of this act, the Supreme Court continued to follow the old general common law liability rules but transformed them into rules of federal common law binding in state and federal courts. *Morris* v. *Covan Worldwide Moving Inc.*, 144 F. 3d 377 (5th Cir. (La.) 1998). The Carmack Amendment geographical scope comprises a shipment originating in the U.S. with destination adjacent, to the U.S., countries and excludes transportation originating from an adjacent country, or transportation to or from a foreign country non-adjacent to the U.S. Otherwise, federal common law as existed before enactment of these acts applies. Saul Sorkin, «Limited Liability in Multimodal Transport and the Effect of Deregulation» (1989) 13 Tul. Mar. L. J. 285 at 287 and 294 on this point. The 1980 *Motor Carrier Deregulation Act*, Pub. L. No. 96-296, 94 Stat. 793 (1980) [hereinafter MCA] is applicable to motor carriers. This act was amended by the 1994 *Trucking Industry Regulatory Reform Act* Pub. L. No. 96-296, 108 Stat. 803 (1994) [hereinafter TIRRA] and the *Interstate Commerce Commission Termination Act of 1995*, Pub. L. No. 96-296, 94 Stat. 793 (1995) [hereinafter ICCTA]. Stephen G. Wood, «Multimodal Transportation: an American Perspective on Carrier Liability and Bill of Lading Issues» (1998) 46 Am. J. Comp. L. 403 at 411.

[28] 49 U. S. C. A. par. 11706 (Carmack Amendment) recited in *Missouri Pac. R. Co.* v. *Elmore and Stahl*, 84 S. C. 1142 (S. Ct. 1964). *Beta Spawn Inc.* v. *FFE Transportation Services Inc.*, 250 F. 3d 218 (3rd Cir. Pa. 2001). Proof is made by preponderance of evidence relying on direct or circumstantial evidence. For the *prima facie* case see also ***supra*** at 5.

owner v) inherent nature of the goods vi) delay due to stoppage in transit vii) natural shrinkage[29].

Section 137(1) of the 1996 *Canada Transportation Act* permits shippers and railways to contractually define their liability (Section 127(2))[30]. U.S. railways are subject to the *Carmack Amendment*, the 1980 *Staggers Act* and the 1995 *Interstate Commerce Commission Termination Act* (ICCTA) that sanctions the principle of freedom of contracting[31]. Although rail BOL provisions in the two countries define specific rail carrier liability exceptions, U.S. and Canadian international intermodal rail tariffs[32] take precedence over BOL provisions because of their specificity to the intermodal carriage and their contractual nature[33]. Said tariffs sanction the principle of carrier liability for

---

[29] Dr. Boris Kozolchyk, Gary T. Doyle, Lic Martin Gerardo Olea Amaya, *Transportation Law and Practice in North America* (Tuscon: National Law Center for Interamerican Free Trade, 1996) at 53. Current forms of motor BsOL contain the additional exceptions of 'riots' and 'strikes'.

[30] *Canada Transportation Act*, S.C. 1996, c. 10 and *Promech Sorting Systems B.V.* v. *Bronco Rentals & Leasing Ltd* (1995), 123 D. L. R. (4th) 111 (Man. C. A.). In July 2001, Canada Transportation Act Review Panel in charge of a comprehensive review of the act (every) four years after its entry into force (1996), made recommendations on competition, mergers, commercial operations, e-business... but not on liability or insurance provisions of the Act. *Final Report Released on Canada Transportation Act Review* (2001) online: Transportation Canada Homepage <http :www.reviewcta-examenltc.gc.ca/english/pages/whatsnew.htm> (last visited: July 18, 2001). In response to many of the Panel's recommendations, Canada's Transport Minister, David Collenette, introduced amendments to the Canada Transportation Act on February 25, 2003. *Canada Transportation Act Amendments* (2003) online: Transport Canada Homepage <http://www.tc.gc.ca/mediaroom/backgrounders/b03-MM003ec.htm> (last modified: Oct. 20, 2003).

[31] For the Carmack Amendment and ICCTA see ***supra*** note 27. *Staggers Rail Act*, Pub. L. No. 96-448, 94 Stat. 1895 (1980) [hereinafter Staggers Act].

[32] The definition of the term 'tariffs' will prove useful in the present article: tariffs are the rules and rates pursuant to which a carrier is engaged to carry freight. They classify cargo according to commodity and establish rates for freight charges (tariff-rates) for those commodities according to distances, weight, size and other factors. Almost every form of BOL 'incorporates by reference' applicable tariffs. Rates can be tariff or non-tariff, the latter being enforceable in case tariffs do not exist, case that constitutes the exception to the rule. John S. McNeil, *Motor Carrier Cargo Claims* 3d ed. (Toronto: Carswell, 1997) at 38 and 202.

[33] In the present study we will refer to Canadian National (hereinafter CN) tariff 7589-AV Item 300 (13) (Canada), Burlington Northern Santa Fe (hereinafter BNSF) Intermodal Rules and Policies Guide Item 60 and Norfolk Southern (hereinafter NS) Sec. 8. 2 (U.S.). These tariffs can be found electronically: For *CN tariff 7589-AU* (2003) online: Canadian National Homepage <www.cn.ca> under price quote, price documents, intermodal (last visited: Jan. 6, 2003). For BNSF *Intermodal Rules and Policies Guide* (2002) online: BNSF Homepage <http://www.bnsf.com/business/iabu/pdf/intermodal_rules.pdf> (last modified: Aug. 1, 2002 (modifications marked in red)). For NS *Circular #2* (2003) online : NS Homepage for Intermodal Transport <http://www.nscorp.com/intermodal/ShowDoc/english/intermodal/system_information/general/intermodal_rules_circular.pdf> (last modified: October 1, 2003).

Some history: CN railway was created in the early 1800's and, today, it is said to be the most efficient railway company in North America, also because of the company's expansion through mergers and acquisitions. We refer to the CN 1998 acquisition of Illinois Central that expanded the company's southern focus. Peter Holle,

negligence and not the rail BOL principle of presumption of liability. This means that the intermodal rail carrier is not presumed liable once the shipper makes its *prima facie* case. His negligence needs to be proven by the shipper, and the carrier may be -depending on the phrasing this principle is given by legislators- exonerated for mere absence of negligence without need to prove a specific exoneration cause as is the case of the presumption of liability principle[34]. This does not mean to say that rail BOL liability exceptions cannot be combined with the rail tariff principle of carrier liability for negligence. Rail BOL liability exceptions constitute narrow duplications of carrier absence of fault under the principle of carrier liability for negligence[35]. Depending on the railway company, a list of carrier exoneration causes similar to rail BOL liability exceptions may appear in the rail tariff close to the principle of carrier liability for negligence, requiring proof of the specific cause of damage by the carrier[36].

"The Americas: U.S. Regulators jolt a U.S.-Canadian Rail Merger off Track" *Wall. St. J.* (2000) online: WESTLAW (Newsletters), Tom Murray, "The Secret to CN's Success" *Trains Magazine* (2002) online: WESTLAW (All-News) and *Canadian National (History)* (2003) online: Canadian National Homepage http://www.cn.ca/companyinfo/cnsnapshot/companyprofile/en_AboutCompanyProfile.shtml (last modified: November 7, 2003). BNSF was created in 1995, is the product of mergers and covers the western two thirds of the U.S.. NS was founded in the 1800's, it is the product of more than 200 railroad mergers and serves the center-east part of the U.S. (Texas-East Coast). *NS History* (2003) online: NS Homepage <http://www.nscorp.com/nscorp/application?pageid=About%20NS&category=About%20NS&contentId=english/nscorp/about_ns/ns_history.html> (last visited: December 9, 2003).

[34] The difference between the presumption of liability and liability for negligence principles resides in the proof to be brought by the carrier or the shipper. The latter principle requires shipper to prove carrier fault before the burden of proof shifts to the carrier. The former principle presumes carrier liability and requires him to prove specific carrier exoneration causes in order to be exculpated. Jean Louis Baudouin, Pierre Gabriel Jobin, *Les Obligations* 5th ed. (Cowansville, Québec : Les Editions Yvon Blais, 1998) at 702-703 and interview of the author with Pr. Yves Tassel, Professor of Shipping law at the University of Nantes in France (Feb 22, 2002) e-mail: ytassel@hotmail.com for the presumption of liability principle. BNSF Intermodal Rules and Policies Guide Item 62 for the liability for negligence principle.

[35] Stephen Zamora, "Carrier Liability for Damage or Loss to Cargoy in International Transport" (1975) 23 Am. J. Comp. L. 391 at 420 and 411. Robert Hellawell, "The Allocation of Risk Between Cargo Owner and Carrier" (1979) 27 Am. J. Comp. L. 357 at 360. Robert Force, "A Comparison of the Hague, Hague-Visby and Hamburg Rules: Much Ado About?" (1996) 70 Tul. L. Rev. 2051 at 2066.

[36] U.S. BNSF Intermodal Rules and Policies Guide Item 62(1) and NS Sec. 8.3.3(d) provide for these specific exoneration causes, specific but not exhaustive examples of carrier absence of negligence.

Canadian international ocean carriage is subject to the 2001 *Marine Liability Act* (MLA) that implemented the *Visby Rules*[37]. U.S. international shipping is governed by the 1936 *Carriage of Goods by Sea Act* (COGSA) enacting the 1924 Hague Rules[38]. Both these acts cover ocean carrier liability from 'tackle to tackle' but parties in multimodal transport can provide that they apply to the land segment(s) of the multimodal journey or for the time agreed between the parties[39].

Hague and Visby Rules art. 3(4) provide that a bill of lading constitutes *prima facie* evidence that goods were received by the carrier in apparent good order and condition (part of shipper *prima facie* case)[40]. This establishes a presumption of liability against the ocean carrier who can rebut it by proving: i) due diligence to make the vessel seaworthy before and at the beginning of the voyage[41] and ii) a carrier defense[42]. Carrier defenses are more numerous than those encountered in land transport and, at times, specific to ocean carriage:

---

[37] Canadian *Marine Liability Act* (S.C. 2001, c. 6.), also found online: *Marine Liability Act* (2001) online: Canadian Department of Justice Homepage <http://laws.justice.gc.ca/en/M-0.7/> (last modified: August 31, 2001), [hereinafter MLA] contains, in Schedule III, a recast of the Visby Rules. The *Visby Rules* consist of two Protocols amending the *Hague* Rules (August 25, 1924): *Protocol to Amend the International Convention for the Unification for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, February 23, 1968*; and *Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, December 21, 1979* [hereinafter *Visby Rules*] online: Admiralty Law Homepage <http://www.admiraltylaw.com/hague/html> (last modified: February 3, 1999).

[38] *Carriage of Goods by Sea Act*, ch. 229, 49 Stat.1207 (1936) (codified as amended at) 46 U. S. C. App. [ss] 1300-1315 (1988) [hereinafter COGSA]. The COGSA applies to ocean shipments to and from the Unites States (46 U.S.C. par. 1312). *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, Brussels Aug. 25, 1924, 120 L.N.T.S. 155 (entered into force on June 2, 1931) [hereinafter Hague Rules]. Inland carriers in the U.S., –carriers intervening right before cargo is loaded onto the ship and after its discharge as well as water carriers in lakes, rivers, inland waters, intercoastal waterways- are governed by the 1893 Harter Act (46 U.S.C. par. 190-196). Richard W. Palmer, Frank P. DeGiulio, «Terminal Operations and Multimodal Carriage» (1989) 64 Tul. L. Rev. 281 at 326.

[39] Jack G. Knebel, Denise Savoie Blocker, «United States Statutory Regulation of Multimodalism» (1989) 64 Tul. L. Rev. 543 at 554.

[40] See also William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 133 and at 142. U.S.: *U.S.* v. *Ocean Bulk Ships Inc.*, 248 F. 3d 331 (5th Cir. (Tex.) 2001) and *Polo Ralph Lauren L.P.* v. *Tropical Shipping & Const. Co. Ltd.*, 215 F. 3d 1217 (11th Cir. (Fla.) 2000). Canada: *Wirth Ltd.* v. *Belcan N.V.(1996)* [1996], F. C. J. No. 603 (F. C.) and *Voest-Alpine Canada Corp.* v. *Pan Ocean Shipping Co.* (1991), 55 B. C. L. R. (2d) 357 (B. C. S. C.).

[41] Hague and Visby Rules art. 3(1) for vessel seaworthiness. Seaworthiness has been defined as the state of the vessel in such a condition, with such equipment and manned by such a master and crew that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage (due diligence). It must exist 'before and at the beginning' of the voyage.

[42] In U.S. and Canadian ocean and land transport the cause of the loss or, absent proof of the exact cause, the circumstances of the loss (theory of probabilities) have to be identified. (ocean Can/U.S.): William Tetley,

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

b) Fire, unless caused by the actual fault or privity of the carrier.

(c) Perils, dangers and accidents of the sea or other navigable waters.

d) Act of God

e) Act of War

f) Act of Public Enemies

g) Arrest or restraint of princes, rulers or people, or seizure under legal process.

h) Quarantaine restrictions.

i) Act or omission of the shipper or owner of the goods, his agent or representative.

j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.

k) Riots and civil commotions.

l) Saving or attempting to save life or property at sea.

m) Wastage in bulk of weight or any other loss or damage arising from inherent defect, quality or vice of the goods.

n) Insufficiency of packing.

o) Insufficiency or inadequacy of marks.

p) Latent defects not discoverable by due diligence.

q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Art. 3(8) of both the Hague and the Visby Rules prohibits contractual limitation of carrier liability except as provided in the rules (i.e. declaration of value). The conflict with land laws is apparent since in both the U.S. and Canada land carriers can contractually limit their liability (except for Québec motor carriers).

Civil Law Force Majeure Concept: In the civil law based province of Québec and, generally, in civil law systems certain of the mentioned land and ocean[43] carrier liability

---

Marine Cargo Claims (Montréal: International Shipping Publications, 1988) at 365-366. U.S.: Leslie Tomasello Weitz, "The Nautical Fault debate" (1998) 22 Tul. Mar. L. J. 581 at 583. *U.S.* v. *Ocean Bulk Ships Inc.*, 248 F. 3d 331 (5th Cir. (Tex.) 2001), *Skandia Ins. Co., Ltd.* v. *Star Shipping AS*, 2001 A.M.C. 1527 (S. D. Ala. 2001). Canada: *Voest-Alpine Stahl Linz GmbH* v. *Federal Pacific Ltd.* (1999) [1999], F. C. J. No. 1326 (F. C. C.).

[43] When statutory or contractual land carrier liability provisions do not apply to the carrier, civil law principles do in the Canadian province of Québec and common law principles apply to the rest of the Canadian provinces and the U.S. This is not the case with ocean rules and the Province of Québec since when the Hague or the Visby Rules do not take effect, common law provisions apply in Canada (including Québec). It is *ITO and Miida Electronics Inc.* v. *Mitsui O.S.K. Lines Ltd.* (1986), 1 S. C. R. 752 (S. C. C.) (authority case) that held that maritime law is federal law, uniform across Canada and not the law of any province, thus, leaving little scope for the application of provincial legislation in this sphere. See also William Tetley, "The Demise of the Demise Clause?" (1999) 44 McGill L.J. 807 at par. 16, Guy Lefebvre, "L' Uniformisation du

exceptions constitute force majeure (superior force) or fortuitous cause (cas fortuit) events[44]. This is the case, for instance, of the 'acts of God', 'public enemies', 'acts of war', 'authority of law' and 'quarantine' exoneration causes[45]. What's more, in the French version of Canadian motor and rail BsOL and Québec Civil Code ocean carrier provisions, force majeure constitutes a separate carrier liability exception substituting for land/ocean 'acts of God'/'actes de Dieu' exception and other Visby Rules exculpatory incidents[46]. This should not be surprising since the civil law force majeure concept and not a list of liability exceptions is considered to be the corollary of the civil law presumption of liability principle[47].

Droit Maritime Canadien aux Dépens du Droit Civil Québecois: Lorsque l' Infidelité se Propage de la Cour Suprême à la Cour d' Appel du Québec" (1997) 31 Rev. J. Thémis. 577 at par. 1 and André Braën, *Le Droit Maritime au Québec* (Montréal, Canada: Wilson & Lafleur Ltée, 1992) at 7 and at 270. Thus, the Québec force majeure concept is not really applicable to the ocean carrier liability exceptions.

[44] The terms of 'force majeure' and 'fortuitous' events are used interchangeably in civil law tradition. Articles 152 and 165 of the Mexican law 'Vias Generales de Comunicación' exonerate carrier in case of force majeure or fortuitous events. "Transporte, Responsabilidad en el Contrato de Transporte. Pruebas» Jurispr. Corte Suprema Mex (LEXIS-Mexico-Jurisprudencia). Boris Kozolchyk, Martin L. Ziontz, 'A Negligence Action in Mexico: an Introduction of the Application of Mexican Law in the United States' (1989) 7 Ariz. J. Int'l Comp. L. 1 at 28. This is also the case of France (art. 1148 of the French Civil Code), Lousiana and even the U.S. where reference is made to both terms. Before its 1994 revision, Québec Civil Code art. 1072 contained same provision while after 1994, art. 2037 (land transport) and art. 2072 (water carriage) only refer to the force majeure concept. It is generally stated that modern codes have eliminated either one or the other member of the traditionally compound expression. Saúl Litvinoff, "Fortuitous Events v. Irresistible Force" (2001) 5 La. Civ. L. Treat. 16.93.

Even though the terms 'force majeure' and 'fortuitous event' may be used interchangeably, there is a subtle distinction between them. In the force majeure concept (also known as objective force majeure) the notion of 'fault or act of person' is absent. On the other hand, a fortuitous event (or subjective force majeure) is always associated with the fault or act of the carrier. The fortuitous event refers to an event which is external, unforeseeable, irresistible, non-imputable to the carrier, the latter element not being part of the force majeure concept. Maurice Tancelin, *Des Obligations: Actes et Responsabilités* (Montréal : Wilson & Lafleur Ltee, 1997) at 408.

[45] Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Editions Thémis, 1986) at 206.

[46] French version of Canadian land BsOL translates the 'act of God' liability exception into 'force majeure (or cas fortuit) and not into 'acte de Dieu'. Note also that 2001 MLA (Schedule III) 'act of God/acte de Dieu' as well as other liability exceptions (act of war, act of public enemies, arrest or restraint of princes...the (q) exception) are replaced by the force majeure concept in art. 2072 (water transport) of the Québec Civil Code.

[47] Maurice Tancelin, *Des Obligations : Actes et Responsabilités* (Montréal : Wilson & Lafleur, 1997) at 34-35.

In civil law systems a force majeure liability exception and, generally, the force majeure concept refer to an event that must be an external[48], reasonably unforeseeable and irresistible (unsurmountable) cause of damage[49]. 'Inherent vice', an ocean/land carrier exoneration cause which may appear in a force majeure clause[50] does not seem to constitute a force majeure incident under civil law since it does not constitute an external, to the carrier, cause of damage[51]. Even though courts are more lenient today in concluding on irresistibility and unforeseeability, it is certain that the simple presence of an exoneration cause will not absolve the carrier if there is fault on his part[52].

Common Law Force Majeure Clauses: The necessity to explicitly mention land and ocean BsOL liability exceptions instead of using the civil law force majeure concept to exonerate the carrier stems from the fact that English law ignores the concept of force

---

[48] Jean Pineau, *Le Contrat de Ttransport Terrestre, Maritime, Aérien* (Montréal : Editions Thémis, 1986) at 53-54. An external cause of damage is external to the author, its business and activities and not merely external to the object causing the damage while under carrier control. *Eastern Coated Papers Ltd.* v. *Syndicat des Employers de Metier* (1986), A. Q. no. 1012. (Qué. C. A.), *Shawinigan* v. *Lemay* (1981), 1982 C. A. 131 (Qué. C. A.), *Desrochers* v. *P.G. du Québec* (1977), R. P. 304 (Qué. S. C.), *Roberge* v. *Hydro-Québec* (1977), C. P. 246 (C. P.), *Louis Clément Ltée* v. *Sotramont Inc.* (1982), J. E. 82-639 (Qué. S. C.). The U.S. state of Louisiana, to a large extent a civil law jurisdiction, follows the same principle on the issue. Saúl Litvinoff, 'Events Recognized as Fortuitous' (2001) 5 La. Civ. L. Treat. § 16.31. Maurice Tancelin, *Des Obligations : Actes et Responsabilités* (Montréal : Wilson & Lafleur, 1997) at 408.

[49] Unforeseeability and irresistibility do not burden the carrier with an absolute duty to prevent the event but merely require him to take all reasonable measures to foresee and prevent the occurrence of the loss. Unforeseeability: Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Editions Thémis, 1986) at 206s. and 52. *Leopold* v. *Ibex Developments Ltd.* (1977), C. S. 629 (Qué. S. C.) and *Simoneau* v. *Côté* (1981), C. P. 123 on the 'authority of law' exception. Irresistibility: *St Timothée* v. *Hydro-Québec* (1999), J. E. 99-1804 (Qué. S. C.), *Louis Clément Ltée* v. *Sotramont Inc.* (1982), J. E. 82-639 (Qué. S. C.). Unless otherwise provided by the parties impossibility to execute needs to be absolute, not merely onerous. *Canada Starch Co.* v. *Gill & Dufus (Canada) Ltd.* (1990), R. L. 602 (C. A.), *Otis Elevator Co.* v. *A. Viglione & Bros. Inc.* (1981), J. E. 81-92 (Qué. C. A.), *Commission des Normes du Travail* v. *Manufacture Sorel Inc.* (1984), C.S. 747 (Qué. C. A.), *C.S.R. de la Baie des Chaleurs* v. *Sanitor Ltée* (1978), J. E. 78-919 (Qué. S. C.).

[50] ***Infra*** at 14 on inherent vice and force majeure clauses.

[51] Although it is argued that inherent vice can be classified as a force majeure event, Paul Chauveau disagrees with such a classification. Paul Chauveau, *Traité de Droit Maritime* (Paris: Librairie Technique, 1958) at 559. See also Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Editions Thémis, 1986) at 55. This is probably why inherent vice and natural shrinkage are separate exoneration causes from force majeure under art. 2049 (land transport) and art. 2072 (water transport) of the Québec Civil Code. Certain U.S. cases have assimilated 'inherent vice' to an 'act of God' (force majeure event): cases reported by Henry N. Longley, *Common Carriage of Cargo* (San Fransisco, California: Matthew Bender, 1967) at 134.

[52] Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Éditions Thémis, 1986) at 208.

majeure[53]. In reality, there is a common law and Uniform Commercial Code[54] (U.S.) force majeure doctrine but claimants are more likely to recover on the basis of contractual force majeure clauses than on the basis of the doctrine itself[55].

Contractual force majeure clauses are typical in commercial contracts (for instance international sales contracts) and are destined to excuse a party from performing its obligations[56]. Although frequently encountered in transportation contracts, common law force majeure clauses and the civil law force majeure concept are not synonymous terms.

Instead of attempting to articulate a definition of the force majeure concept, force majeure contractual clauses enumerate a laundry list of excusable events that can be

---

[53] Michel Pourcelet, *Le Transport Maritime sous Connaissement (Droit Canadien, Américain et Anglais)* (Montréal : Les Presses de l' Université de Montréal, 1972) at 131.

[54] The Uniform Commercial Code is one of the Uniform Acts that attempts to harmonize the law of the fifty U.S. states. It treats the law of sales and commercial transactions in the United States and is colloquially known as the UCC. This was the first of the Uniform U.S. Acts to be proposed, and is the longest and most elaborate one. The creation of the UCC began in 1940 in an effort to "attack major commercial problems with comprehensive legal solutions". In one or another of its several amendments, it has been enacted in 49 of the 50 States. Louisiana, the sole holdout, has enacted most of the Code, but because that state's commercial law is based on civil law and the Napoleonic Code rather than on common law, it is difficult to harmonize procedure and terminology with the UCC. The Uniform Commercial Code deals with the following subjects under consecutively numbered Articles: 1. General provisions, (including most definitions and rules for interpretation); 2. Sales, including article 2A, on leases; 3. Commercial paper, (including negotiable instruments, the validity of endorsements, and the rights of subsequent holders); 4. Bank deposits; 5. Letters of credit; 6. Bulk transfers 7. Warehouse receipts; 8. Investment securities; 8. Secured transactions (liens and security interests in chattel property). *The Uniform Commercial Code* (2003) online: The Wikipedia Homepage <http://en2.wikipedia.org/wiki/Uniform_Commercial_Code> (last modified: Aug. 3, 2003) and *Uniform Commercial Code* (2002) online: School of Liabrary and Information Science Homepage <http://www.libsci.sc.edu/bob/class/clis748/Studentwebguides/UCC.htm> (last modified: July 1, 2003).

[55] P. J. M. Declercq, "Modern Analysis of the Legal Effects of Force Majeure Clauses in Situations of Commercial Impracticability" (1995) 15 J. L. & Com. 213 at 217-218. Susan Zachos, *Gas Purchase Contracts: Equitable Remedies for Breach* (1987) 24 Hous. L. Rev. 991 at 1012. The common law standard of recovery is quite strict under the force majeure doctrine as it will provide remedy only where extreme hardship has been established. Robert E. Coltin, "Force majeure: Does it Really Work"? 14 Real Estate L. J. 279 at 279-280. Michael B. Victorson and James S. Chase, "How to Interpret Insurance and Indemnification Provisions in Mining Contracts" (1993) 14 E. Min. L. Found par. 7.03. The common law concept of 'force majeure' has developed over the years starting off as a contractual synonym of the common law doctrine of legal impossibility and moving, with time, in the direction of impracticability. P. J. M. Declercq, "Modern Analysis of the Legal Effects of Force Majeure Clauses in Situations of Commercial Impracticability" (1995) 15 J. L. Com. 213 at 214. Michael W. Graff, "The Determination of Property Rights in Public Contracts" (1998) 38 Nat. Res. J. 197 at note 159. Analysis of these theories exceeds the scope of the present study.

[56] *Force Majeure* (2000) online : Yale University Library (Licensing Digital Inforation) http://www.library.yale.edu/~llicense/forcecls.shtml (last modified: 2000).

contractually modified[57]. They concern unforeseeable and irresistible events as the civil law force majeure concept does[58]. However, force majeure clauses enumerate specific abnormal risks exonerating the debtor while civil law force majeure concept contains a non-exhaustive list of exculpating occurrences responding to specific criteria[59].

This does not mean to say that the force majeure concept is necessarily broader in scope than a force majeure clause; they are just different in nature. Force majeure clause events may not be external to the carrier and may cover inherent vice, elements that are not part of the civil law force majeure concept[60]. Moreover, even though many force majeure clauses contain a 'reasonable control' language to indicate absence of (carrier) negligence, this is not always the case and the drafter could also specify the reasonable control language or even decide to exempt certain faults or negligent acts of the parties[61]. In other words, force majeure clauses are contractual clauses that parties can tailor to their needs and which do not have to respond to the rigid conceptual criteria of the civil law force majeure concept. Being so malleable in nature, force majeure clauses and the civil law concept of force majeure cannot be effectively compared.

---

[57] The most prevalent force majeure clause events are: acts of God, fire, flood, acts of civil disobedience, war, riot, nuclear disaster, labor disputes, acts of governments, unusual climatic conditions, acts of a public enemy, explosion, or power failure. H. Ward Classen, "Judicial Intervention in Contractual Relationships under the Uniform Commercial Code and Common Law" (1991) 42 S. C. L. Rev. 379 at 394.

[58] This is to be taken into account in drafting a force majeure clause. Robert E. Coltin, "Force majeure: Does it Really Work"? 14 Real Estate L. J. 279 at 279-280. P. J. M. Declercq, "Modern Analysis of the Legal Effects of Force Majeure Clauses in Situations of Commercial Impracticability" (1995) 15 J. L. Com. 213 at 233, 236 and 238.

[59] It has been stated that a civil law contract is more succinct in defining force majeure since the tendency is not to clarify or embellish established concepts such as force majeure. John D. Crothers, 'Recent Experience in Project Finance and Privatization in Africa' (2000) 809 PLI/Com 519. *Canada Starh* v. *Gill and Duffus (Canada) Ltd.* (1983), J. E. 84-88 (S. C. Qué.).

[60] *River Terminals Corp.* v. *U. S.*, 121 F. Supp. 98 (E. D. La. 1954) reciting hull insurance contract provisions covering inherent vice. ***Supra*** at 12 for inherent vice.

[61] P. J. M. Declercq, "Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability" (1995) J. L. Com 213 at 248. Force majeure clauses can be statutorily provided and even though their language was once regarded precise and of strict construction, it is now increasingly recognized by courts as malleable. ***Ibid*** at 233. Harold F. Moore, "Force Majeure and Indonisia's Economic Woes" (2001) 1240 PLI /Corp 463.

Conclusion: All herein examined unimodal carrier liability concepts (presumption of liability, liability for negligence, civil law force majeure concept and common law force majeure clauses) compose the basis of intermodal carrier liability in the U.S. and Canada. The analysis of said concepts aims at clarification of intermodal carrier rules in the two countries. Clarity of applicable rules facilitates transport transactions and provides a solid basis for legal thought to grow in an era where uniformity of intermodal carrier liability rules is sought at the international level (το σοφόν σαφές και το σαφές σοφόν)[62].

[62] Ancient Greek saying that translates into: "the wise is clear and the clear is wise".